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ALEXANDER L. STEVAS,
CLERK

80-1940

No. _____

United States Supreme Court
OCTOBER TERM 1980

Russell Floyd Long, Appellant

vs.

District Director, Internal Revenue Service, Phoenix, Arizona

Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS
For the Tenth Circuit

JURISDICTIONAL STATEMENT

Russell Floyd Long
(03892-156)
Appellant Pro Per
P.O. Box 1000
Leavenworth, Kansas
66048

QUESTIONS PRESENTED

Rule 15.1.(a)

1. Whether appellant was denied due process. See, in addition to herein disclosures, paragraph 4 (a) of APPENDIX G.

2. Whether the presentation of new, different grounds *NOT* previously considered, constitutes compliance with the law, i.e., with 28-2244, even though it concerns the same issue. **See paragraph 8 of APPENDIX F and paragraph 3(b)(3), APPENDIX G.**

3. Whether 18-3568 nullifies *consecutive* sentences for different counts of only one (1) offense, i.e., one (1) simultaneous transaction wherein only one (1) statute was violated only one (1) time. **See paragraph 8 of APPENDIX F.**

4. How does one violate a penalty (sentencing) statute, e.g. 18-924(a)?

5. Whether the presentation of proof showing illegal imprisonment constitutes frivolity. See ruling, APPENDIX C.

6. Whether different circuits can legally and indefinitely promulgate and maintain diverse rulings regarding interpretation of the same law(s). See APPENDIX B.

7. Whether such appellate court divarication is a denial of the equal protection afforded by due process.

8. Whether the required use of a 2255 Motion causes suspension of the FORTHWITH requirement which is the essence of habeas corpus. See paragraph 3(c)(3) through (c)(9), APPENDIX G.

9. Whether 28-2255 is *EX POST FACTO* and therefore unconstitutional. See paragraphs 3 (c)(3) through (c)(9), APPENDIX G.

PARTIES BELOW
Rule 15.1(b)

The appellant in this case is Russell Floyd Long, pro per, Leavenworth Federal Penitentiary, Kansas.

The appellee is District Director, Internal Revenue Service, Phoenix, Arizona.

The Judges are Richard D. Rogers, U.S.D.C., Topeka, Kansas and James E. Barrett, Monroe G. McKay and James K. Logan, Tenth Circuit Court of Appeals, Denver, Colorado.

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Rule 15.1.(c)

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U.S. CODE:

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OPINIONS BELOW

Rule 15.1.(d)

Slip Opinion by Tenth Circuit Court of Appeals, FILED 22 December 1980. APPENDIX A.

Memorandum and Order by the U.S. District Court of Kansas, FILED 12 September 1979. APPENDIX B.

Judgment/Memorandum and Order by the U.S. District Court of Kansas, FILED 17 December 1979. APPENDIX C.

Judgment by Tenth Circuit Court of Appeals, FILED 29 December 1980. APPENDIX D.

STATEMENT OF JURISDICTION

Rule 15.1. (e)(i) and (e)(ii)

(e)(i) U.S. Supreme Court jurisdiction is invoked under Title 28, Section 1252, on appeal from judgment of the Tenth C.C.A. in case No. 80-1103. The U.S.D.C. of Kansas and the Tenth C.C.A. did neglect/fail/refuse to observe/provide/follow the Fifth Amendment's requirement for due process and both did diversely misinterpret the plain and unambiguous wording of a statute enacted by the U.S. Congress so that for herein appellant's case it violates the U.S. Constitution's Fifth Amendment *prohibition against* double jeopardy and further, violates the same Fifth Amendment's *requirement for* equal protection of the law(s).

The herein contested rulings, i.e., interpretations of concurrent versus consecutive feature of 18-3568, obviously cannot both be the intention of congress. Thus, a decision favoring consecutive has to invalidate concurrent and vice versa, so appellant's direct appeal is from a decision in validating an Act of Congress.

(e)(ii) Slip Opinion by Tenth Circuit Court of Appeals, FILED 22 December 1980. APPENDIX A.

Judgment by Tenth Circuit Court of Appeals, FILED 29 December 1980. APPENDIX D.

Notice of Appeal to U.S. Supreme Court, FILED 21 January 1981 with the Clerk of the Tenth Circuit Court of Appeals. APPENDIX E.

STATUTORY PROVISIONS

Rule 15.1.(e)(iii)

(e)(iii) Title 28, Section 1252.

Cases that sustain jurisdiction:

U.S. vs BELT, 516 F. 2d 873,C.A.S.D.1975; In respect to offenses arising from a single incident, the common-law doctrine of merger no longer exists, but that the term is now commonly used to refer to the constitutional prohibition, arising out of the double jeopardy clause, against punishing a person twice for the same act or offense.

U.S. vs CALHOUN, 510 F. 2d 861, (74-1259) 1-24-75, 7 Cir.

"Where evidence indicated that two guns which defendant obtained by giving false statement were obtained at the same time *only one* offense was committed." 18 U.S.C. 922 (a)(6).

U.S. vs ROSENBARGER, Jr., 536 F. 2d 715, 6 Cir. 1976;

Simultaneous acquisition, possession, transportation of multiple firearms is *only one* (1) offense.

Others as listed on back of page 3 of document dated 24 March 1979 and designated, upper right corner on first page, as document 55). Is a part of the certified record permitted by S. Ct. Rule 13 and requested by appellant's Motion dated 4 February 1981.

Others as listed in paragraphs 3(c)(5), (c)(6) and (c)(7) of Docketing Statement (80-1103), dated 17 January 1980. See APPENDIX G.

CONSTITUTIONAL PROVISIONS
Rule 15.1.(f)

(f) The U.S. Constitution with emphasis on but *not limited to* the following, which includes the inherent separation of powers:

ARTICLE I, Section 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 9 (2): "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Section 9 (3): "No bill of attainder or ex post facto law shall be passed."

ARTICLE II, Section 1 (1): "The Executive power shall be vested in a President of the United States."

ARTICLE III, Section 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

Section 2 (1): "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Section 2 (2): "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such

regulations as the Congress shall make."

ARTICLE VI, Paragraph 2: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby...".

Paragraph 3: "The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution."

AMENDMENT V: "...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... not be deprived of life, liberty, or property without due process of law; ..."

U.S. CODE: Title 18, Section 3568.
Title 28, Section 1252.
Title 28, Section(s) 2241 thru 53.
Title 28, Section 2255.
Rule 81(a)(2) of Civil Procedure.

STATEMENT OF THE CASE
Rule 15.1.(g)

(g) The Tenth Circuit Court of Appeals has made this appeal to the U.S. Supreme Court into a duplicate or near duplicate of appellant's original appeal from the U.S.D.C. of Kansas. Both appeals allege/contend/prove Fifth Amendment deprivation(s), namely, denial of due process, denial of equal protection of the law(s) and failure to protect from double jeopardy. The Tenth C.C.A. states in its slip opinion (filed 22 December 1980) that, quote:

"This appeal from denial of relief by the district court is affirmed for the reasons given in the trial court's memorandum and order." See APPENDIX A.

Appellant's understanding is that the circuit court's duty is not to review the district court's finding of facts but to determine if the district court judge applied the law properly, and obviously, this appeal contends that he didn't because *proper application of the law cannot encompass a denial of due process and/or the other constitutional deprivations noted supra.* Thus, it appearing that possibly neither the district court nor the circuit court judges understand the plain and unambiguous wording of the law (18-3568 and others appurtenant thereto, including the circuit courts' duties/functions), appellant has no alternative to presenting this appeal to the U.S. Supreme Court which, see ARTICLE III, Section 2 (2) of the Constitution, has appellate jurisdiction, both as to law and fact.

The constitutional misapplication of a plain and unambiguously worded law enacted by the U.S. Congress is herein being challenged because its misapplication appears to apply to only this herein appellant.

Convincing proof that 18-3568 precludes consecutive sentences for multiple counts of only one simultaneous transaction is overwhelmingly evident by simple inspection of the numerous case law(s) available. See paragraphs (e) (iii) supra **and Paragraph 8 of APPENDIX F.**

The appetite for power engendered by lifetime tenure is not conducive to detracting from authority but to expanding it, therefore judges are not going to unnecessarily limit their authority, so where did the judges who have rendered supra case law obtain information as to what Congress intended? The only source available

was/is the law itself as restricted by the requirements of the U.S. Constitution, especially by the Fifth Amendment thereto. Concurrent sentencing was/is a true and correct interpretation because consecutive sentencing violates the Fifth Amendment's *prohibition against* double jeopardy and its *requirements for* equal protection.

Supra 18-3568 contention/argument/premise was submitted to the U.S.D.C., Topeka, Kansas (78-3292) as long ago as 28 November 1978, in a habeas petition designated, upper right corner of first page, as 47). This document 47) became document 49), dated 13 December 1978, when the District Court at Topeka deemed its printed forms preferable to movant's open discourse, though conveyed information was/is identical. Judge Rogers declined to consider 18-3568 in his Memorandum and Order, FILED 9 February 1979 (see certified Record), wherein he disclaimed jurisdiction absent a showing that petitioner (appellant) had been denied relief via 2255 Motion.

Petitioner (appellant) was subsequently denied relief via 2255 Motion that did *NOT* include his herein argument concerning 18-3568. Until Judgment/ Memorandum and Order by the U.S.D.C. of Kansas (79-3236), dated 17 December 1978, there had never been a ruling that considered the 18-3568 premise.

Appellant's Docketing Statement (80-1103), dated 17 January 1980 (APPENDIX G), presented to the Tenth C.C.A. the questions sought to be reviewed, but the Tenth C.C.A., in its Slip Opinion, FILED 22 December 1980, stated that, quote:

> "This appeal from denial of relief by the district court is affirmed for the reasons given in the trial court's memorandum and order."

This slip opinion actually says that appellant's appeal is

affirmed, but the Judgment FILED 29 December 1980 says that the judgment of the District Court of Kansas is affirmed.

Judge Rogers of the U.S.D.C. of Kansas says that different circuits may, can and do rule differently on the same issue(s) and that no circuit is compelled to follow the rule of another circuit or even the majority rule of all the circuits. See Memorandum and Order in Kansas 78-3292, dated 12 September 1979. APPENDIX B.

From personal experience appellant knows that Judge Rogers is correct in his appraisal, even though the Fifth Amendment's prohibitions and requirements, as a part of the Constitution, are supposed to be the supreme law of the land. Therefore, it is now incumbent on the U.S. Supreme Court to create order out of chaos. All it need do is require uniform adherence to the requirements provided in the Constitution. It has the authority. Why does it procrastinate?

THE QUESTIONS ARE SUBSTANTIAL
Rule 15.1.(h)

(h) The courts previously herein involved, i.e., the U.S.D.C. of Kansas and the Tenth C.C.A. have illegally/unconstitutionally *denied appellant his Fifth Amendment right to due process,* have *failed to protect him against double jeopardy* and further, *did fail to provide him with the equal protection of the law(s).* APPENDICES C and F.

The Tenth C.C.A. ignored the questions presented, i.e., items (a) thru (k) in paragraph 4 of appellant's Docketing Statement (80-1103), dated 17 January 1980. APPENDIX G.

Due process requires that for each question presented, appellant should receive a meaningful answer sustained

by legal reason(s) and not just a spurious reply that evades the real question and is then followed by an all inclusive blanket statement that the other questions, contentions, issues are considered to be without merit.

If the courts would proceed in accordance with the requirements of their own promulgated Rules and conform to the stringencies of applicable laws that fully comply with the requirements of the Constitution, then there should be no need for oral argument or for continuing appeal. The fact that this relatively simple matter has to seek resolution in the Supreme Court is a true indication of the presently deleterious and irresponsible nature of lower federal court proceedings. Further, if the courts would stop assisting the Internal Revenue Service in its effort(s) to extort money from appellant as punishment for his exercise of a First Amendment Constitutional right, i.e., his submission of a PETITION FOR ASSISTANCE to Robert M. McKeever, District Director of the I.R.S., Phoenix, Arizona, dated 12 February 1974, this case would not now be before this court or have been before any other court and neither would U.S.D.C. of Kansas case 80-3146, dated 30 June 1980.

(i) Rule 15.1.(i) is NOT APPLICABLE.

APPENDICES A thru G

Rule 15.1.(j)(i), (ii), (iii), (iv) and (v)

(j) The following documents are hereto appended under the proper subdivision of category (j) material:

(i) Slip Opinion of Tenth C.C.A. in case No. 80-1103, FILED 22 December 1980. APPENDIX A.

Judgment of Tenth C.C.A. in case No. 80-1103, FILED 29 December 1980. APPENDIX D.

(ii) Memorandum and Order of the U.S.D.C. of

Kansas in case No. 78-3292, FILED 12 September 1979. APPENDIX B.

Petition 79-3236 to the U.S.D.C. of Kansas, dated 19 November 1979. APPENDIX F.

Judgment, Memorandum and Order by the U.S.D.C. of Kansas in case No. 79-3236, FILED 17 December 1979. APPENDIX C.

(j)(iii) Same as (j)(i) supra.

(iv) Copy of appellant's Notice of Appeal, FILED 21 January 1981 with the Clerk of the Tenth Circuit Court of Appeals. APPENDIX E.

(v) Appellant's Docketing Statement (80-1103) to the Tenth C.C.A., dated 17 January 1980. APPENDIX G.

DATED May 15, 1981

Appellant certifies that on date supra 40 copies of this Jurisdictional Statement were mailed to the Clerk, U.S. Supreme Court, Washington, D.C. 20543, and 3 copies were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Russell Floyd Long (03892-156)
Appellant pro per
P.O. Box 1000
Leavenworth, Kansas 66048

APPENDIX A

United States Court of Appeals
FOR THE TENTH CIRCUIT

Slip Opinion

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
Tenth Circuit

RUSSELL FLOYD LONG, *Petitioner/Appellant,* vs. DISTRICT DIRECTOR, I.R.S. Phoenix, Arizona, Authentic Respondent, *Respondent-Appellee.*	No. 80-1103 FILED Dec. 22, 1980

Appeal from the United States District Court
For the District of Kansas
(D. C. No. 79-3236)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Russell Floyd Long, pro se.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This appeal from denial of relief by the district court is affirmed for the reasons given in the trial court's memorandum and order. The mandate shall issue forthwith.

In the United States District Court
FOR THE DISTRICT OF KANSAS

RUSSELL FLOYD LONG,
Petitioner,
vs
IRL DAY, WARDEN,
Respondent

Case No. 78-3292

FILED
Sept. 12, 1979

MEMORANDUM AND ORDER

On February 9, 1979, this Court entered an Order dismissing this petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 on the ground that petitioner's exclusive remedy was a § 2255 motion to vacate in the sentencing court in the District of Arizona. On March 5, 1979, this Court denied petitioner's motion for rehearing in which he contended that all judges in Arizona are prejudiced.

The Court now has before it petitioner's "motion to reactivate" this case. Attached are copies of a § 2255 motion to vacate filed by petitioner and an Order of the Arizona District Court denying the motion on April 30, 1979. The motion was dismissed because petitioner's grounds were found to have been already considered and rejected on appeal, *United States v. Long,* 524 F.2d 660 (9th Cir. 1975).

Petitioner contends that because neither the appeals court nor the sentencing court refer to one case cited by him in support of his claim, *United States v. Calhoun,* 510 F.2d 861 (7th Cir. 1975) *cert. denied,* 421 U.S. 950, his claim has not been considered on the merits. This contention is patently absurd.

Petitioner challenges his conviction on the ground that he was given consecutive sentences on two counts when

the facts support only one offense. This claim was considered and rejected by the United States Court of Appeals, Ninth Circuit, in *United States v. Long, supra,* at 661, 662. In its opinion the Court reasoned that under 18 U.S.C. § 922(a) (6) the unit of prosecution proscribed by Congress was the giving of a false statement in connection with the acquisition of each weapon. The Court further found that "Long filled out a separate form for each gun and thus gave a false statement in connection with the sale of each," at 662.

*In **United States v. Calhoun, supra** relied upon by petitioner, it was noted that there is a minority as well as a majority rule on this question. The majority rule prevailing in the Seventh Circuit was that unlawful acquisition of two firearms at the same time constituted a single offense. While this may be the rule in the Seventh Circuit and even in the majority of circuits, the Court of Appeals for the Ninth Circuit is not compelled to follow the majority rule and apparently does not.*

Petitioner's claim was denied on the merits and may not be entertained by way of a petition for writ of habeas corpus.

IT IS THEREFORE ORDERED that this motion for rehearing be and hereby is denied.

The Clerk is directed to transmit copies of this Memorandum and Order to petitioner and to the Office of the United States Attorney in Topeka, Kansas.

IT IS SO ORDERED.

Dated this 12th day of September, 1979, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
United States District Judge

APPENDIX C
Judgment on Decision by the Court

69)

United States District Court
for the
DISTRICT OF KANSAS

17-Dec. 1979
CIVIL ACTION FILE No. 79-3236

RUSSELL FLOYD LONG,
Petitioner,

vs.

DISTRICT DIRECTOR, I.R.S.
Phoenix, Arizona
Respondent.

JUDGMENT

FILED
Dec. 17, 1979

This action came before the Court, Honorable Richard D. Rogers, United States District Judge, presiding, and a decision having been duly rendered,

It is Ordered and Adjudged that all relief be denied, and that the action be and it hereby is dismissed.

Dated at Topeka, Kansas, this 17th day of December, 1979.

ARTHUR G. JOHNSON
Clerk of Court

Patricia A. Robbin
Deputy

In the United States District Court
FOR THE DISTRICT OF KANSAS

RUSSELL FLOYD LONG,
Petitioner,

vs.

DISTRICT DIRECTOR, I.R.S.
Phoenix, Arizona
Respondent

Case No. 79-3236

FILED
Dec. 17, 1979

MEMORANDUM AND ORDER

Russell Floyd Long submitted this petition for writ of habeas corpus to the United States Court of Appeals for the Tenth Circuit pursuant to Rule 22, Federal Rules of Appellate Procedure. The petition was then transferred to this district for "consideration and disposition." Having examined all the materials filed by petitioner, the Court makes the following findings and Order.

Long is currently incarcerated in the United States Penitentiary, Leavenworth, Kansas, by reason of his conviction in the United States District Court for the District of Arizona on two counts of making false statements in the acquisition of firearms in violation of 18 U.S.C. § 922(a) (6). His conviction was affirmed on October 20, 1975, Case No. 74-3458 (9th Cir.).

Petitioner contends that he was illegally sentenced. The foundation of his claim is the assertion that one count should have been charged in the indictment rather than two. To support this assertion he alleges that even though he purchased two firearms, he did so during a single transaction. This Court has declined on other occasions to entertain this exact claim by petitioner. *Long v. Day,* No. 78-3292 (D. Kan., Feb. 9, 1979): *Long v. Attorney General of United States,* 77-3129 (D. Kan., Aug. 1, 1977); *Long v. Attorney General,* 76-43-C3 (D.

Kan., April 20, 1976). Petitioner has been repeatedly informed that his exclusive remedy to raise this claim is by motion to vacate in the sentencing court pursuant to 28 U.S.C. § 2255. His claim that the indictment was multiplicitous is one for the sentencing court. It shall not be heard by this Court unless and until substantial factual allegations are presented indicating that such remedy is inadequate or ineffective.

Long attempts to circumvent the remedy under § 2255 by asserting that his claim involves a violation of 18 U.S.C. § 3568, which deals with computation of sentences by the Attorney General. However, the facts of this case in no way evince a violation of that section. Petitioner avers that he received two consecutive sentences. The Bureau of Prisons must compute his sentences in accordance with the Judgment and Commitment Order which presumably reflects that he was sentenced to two consecutive terms. *Petitioner's claim under 18 U.S.C. § 3568 is frivolous and is hereby denied on the merits.*

IT IS THEREFORE ORDERED that this action be dismissed and all relief denied and that the Clerk transmit copies of this Memorandum and Order to petitioner and to the United States Attorney in Topeka, Kansas.

Dated this 17th day of December, 1979, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
United States District Judge

APPENDIX D

United States Court of Appeals
FOR THE TENTH CIRCUIT

NOVEMBER TERM - December 22, 1980

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

RUSSELL FLOYD LONG, *Petitioner-Appellant,* v. DISTRICT DIRECTOR, I.R.S. Phoenix, Arizona, AUTHENTIC RESPONDENT, *Respondent-Appellee*	**JUDGMENT** No. 80-1103 (D. C. No. 79-3236)

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

FILED
Dec. 29, 1980
ARTHUR G. JOHNSON, Clerk
By Cherryl Masters, Deputy

By
Rosalyn Peterson
Deputy Clerk

Upon consideration of the record on appeal and the files of this court, it is ordered that the judgment of the United States District Court for the ----- District of Kansas is affirmed on the court's own motion pursuant to Rule 9 of the Rules of this Court.

HOWARD K. PHILLIPS, Clerk

Robert L. Hoecker

APPENDIX E

In the Supreme Court of the United States

RUSSELL FLOYD LONG,
Appellant

TENTH CIRCUIT COURT OF APPEALS,
Appellee

No.....

NOTICE of APPEAL

Pursuant to 28-1252

Notice is hereby given that appellant Russell Floyd Long hereby appeals to the United States Supreme Court from the slip opinion FILED 22 December 1980 and judgment FILED 29 December 1980 by the Tenth Circuit Court of Appeals in case No. 80-1103.

DATED: 17 - Jan. 1981

****

Appellant certifies that on date supra, the original and five (5) copies of this Notice of Appeal were mailed to the Clerk, Tenth C.C.A., c 404, US Courthouse, Denver, Colorado 80294, and one (1) copy was sent to the Solicitor General, Department of Justice, Washington, D.C. 20530.

FILED
United States Courts of Appeals
Tenth Circuit
JAN. 21, 1981
HOWARD K. PHILLIPS
Clerk

Russell Floyd Long
Russell Floyd Long
(03892-156)
Appellant pro per
P.O. Box 1000
Leavenworth, Kansas
66048

APPENDIX F

U.S. Court of Appeals
FOR THE TENTH CIRCUIT

67)

Russell Floyd Long
Petitioner
vs.
District Director, I.R.S.
Phoenix, Arizona
Authentic Respondent

DOCKETED
11 - Dec. 1979

CASE No. 79-3236
U.S.D.C., Topeka

Petition for Writ of
Habeas Corpus

ad Subjiciendum
(Articles I and VI,
U.S. Const.)
(Title 28,
Sections 2241-53)

Petitioner, confined in/at the Federal Penitentiary, Leavenworth, Kansas, has prepared this habeas document for submission to a circuit judge of the Tenth Circuit Court of Appeals as authorized by 28-2241(a). His reason(s) for *NOT* making application to the District Court of Kansas as per 28-2242 is adequately explained infra. See especially paragraphs 9 thru 15.

PETITIONER STATES AS FOLLOWS:

1. That, on or about 28 June 1974, he was assessed consecutive terms of five (5) years and five thousand dollars ($5000.) fine for each of two counts of guilty verdict in CR-74-155 PHX-AZ-AAH.

2. That he served a total of five (5) calandar years plus five months as of the 1st of November 1979.

3. That, this was/is his first/only conviction.

PETITIONER INVITES JUDICIAL NOTICE OF THE FOLLOWING PARAGRAPHS 4 THRU 8 INCLUSIVE.

4. That, consecutive sentences for two counts of the

same offense are precluded by the wording of 18-3568, quote:

"The Attorney General shall give...credit toward service of...sentence for any days spent in custody in connection with the *offense or acts* for which sentence was imposed".

5. That, petitioner's offense was/is an alleged violation of 18-922(a)(6) with penalty as provided by 924(a).

6. That, petitioner's *act(s)* was purchase of two (2) firearms at one and the *same* time.

7. That, it was/is firmly established that *ONLY one (1) transaction occured only one (1) time,* because the two count INDICTMENT gives the same date for both counts and then neglects further specificity. Additionally, see attached/enclosed Ninth Circuit Court of Appeals OPINION No. 74-3453 (page 2 of 5), filed on 20 October 1975, and designated EXHIBIT "Y", quote:

"It was also discovered that Long had purchased another pistol at the *same time,* this one a .44 revolver".

8. *That, there being only one (1) offense, i.e., only one (1) occurrence of simultaneous acts where in only one (1) statute, i.e., 18-922(a)(6), was violated only one (1) time, the time spent in custody has to be in connection with/for this one (1) offense, there being no other for which sentence was imposed. Consequently,* ***credit for time served applies equally to both counts at one and the same time,*** *because Congress herein provided* ***NO WAY*** *for service of one sentence to be held in abeyance until completion of another. In other words, separate sentences for two counts of only one offense must be concurrent, otherwise there is conflict with and violation of 18-3568, which further states that:*

"No sentence shall prescribe any other method of computing the term".

9. That, supra 18-3568 contention/argument/premise was submitted to the U.S.D.C., Topeka, Kansas (Case No. 78-3292) as long ago as 28 November 1978, in a habeas petition designated, upper right corner, as 47). Copy previously furnished, see 79-8066.

10. That, part 47) became part 49) dated 13 December 1978, when the District Court at Topeka deemed it printed forms preferable to movant's open discourse, though conveyed information was/is identical.

11. That, attached to part 47) is the therein referred to part 26), the page 2 from the Ninth C.C.A. OPINION No. 74-3458, i.e., EXHIBIT "Y" and four pages dealing with ISSUE "E" from petitioner's REVISED HABEAS PETITION dated 17 November 1975, designated as part 1).

12. That, Judge Richard D. Rogers declined to consider 18-3568 in his Memorandum and Order, part 50), FILED 9 February 1979, (copy previously furnished-see 79-8066) wherein he disclaimed jurisdiction absent a showing that petitioner had been denied relief via a 2255 Motion.

13. That, petitioner was subsequently denied relief via 2255 Motion that did *NOT* include his herein argument concerning 18-3568.

14. That, petitioner did then request reactivation of 78-3292 with the provision that all therein reference to and consideration of 18-3568 be deleted without prejudice to its later reinstatement and that a ruling be predicated on petitioner's right to protection equal to that afforded CALHOUN. See 79-8066 for attached/enclosed copies of parts 62) and 63), DENIED 12 September 1979.

15. That, there has *NEVER* been a ruling on ISSUE "E" that considered supra 18-3568 premise, so it is therefore new grounds *NOT* heretofore considered.

16. That, the consecutive, i.e., double maximum

sentence should be vacated.

17. That, petitioner prays for action FORTHWITH which is the essence of habeas corpus and a requirement of due process.

18. Petitioner certifies that on date infra he did mail the original and two copies (excluding all attachments/ enclosures previously furnished on 23 October 1979) of this habeas corpus petition to the Clerk, Tenth Circuit Court of Appeals, c 404 U.S. Courthouse, Denver, Colorado, 80294.

19. Petitioner asks that he be promptly informed of filing fee(s) and/or other necessary costs.

DATED: 19 November 1979

Respectfully submitted,
Russell Floyd Long
Russell Floyd Long (03892-156)
Petitioner Pro Per
P.O. Box 1000
Leavenworth, Kansas 66048

APPENDIX G

United States Court of Appeals
TENTH COURT
No. 80-1103

Russell Floyd Long
petitioner/appellant

vs

District Director, I.R.S.
Phoenix, Arizona
***Authentic* respondent/appellee**

(Appeal of 79-3236, U.S.D.C, Topeka, Kansas)
(See 79-8066, Tenth C.C.A., Denver, Colo.)

DOCKETING STATEMENT

1. This is an appeal from the JUDGMENT, Memorandum and Order in case No. 79-3236, U.S.D.C., Topeka, Kansas (copy attached/enclosed).

2. Supra documents were filed 17 December 1979. The notice of appeal, dated 11 January 1980, was filed 15 January 1980 (copy attached/enclosed).

3. (a)(l) Richard D. Rogers, U.S.D.C. Judge, Topeka, Kansas, denied petitioner/appellant due process by ruling on habeas corpus petition 79-3236. Supra habeas action (dated 19 November 1979) was transferred to Topeka, Kansas by the Tenth Circuit Court of Appeals at Denver, Colorado where it had number 79-8066. The Topeka Court received and docketed it on 11 December 1979, assigning it No. 79-3236 (see copy attached/ enclosed with designation, upper right corner, as habeas document 67), and six days later (why the hurry? Was/is there any connection with the protracted delay in service of summons in case 79-3203) there occurred supra denial

of due process because *petitioner* Russell Floyd Long in Kansas Case 79-3236 (docketed 11 December 1979) is *plaintiff* Russell Floyd Long in Kansas Case 79-3203 (dated 9 October 1979), and Judge Richard D. Rogers is one of the defendants therein. Complaint 79-3203, dated 9 October 1979 and FILED 30 October 1979 with Amendment thereto FILED 15 November 1979, was originally dated/presented 2 July 1979. Copies of both Complaint and the Amendment, *not* including all the therein referenced documents, are attached hereto and/or enclosed herein.

(a)(2) Although extensive manipulating has occurred to deter/delay/prevent plaintiff from Amending complaint 79-3203 (see Letter-Motions dated 6 December and 8 December 1979, also unsigned Memoranda from clerk's office at Topeka, dated 15 November, 30 November and 7 December, all 1979) naming additional defendants, including Clerk Arthur G. Johnson, there can be no denying that Judge Richard D. Rogers, despite a lack of service of summons due to the contrived delay, is/was fully aware of his defendant status. See transfer ORDER attached/enclosed, *FILED 2 November 1979,* by Judge Frank F. Theis of Wichita, assigning case 79-3203 to Judge Earl E. O'Conner, Kansas City, Kansas, because Chief Judge Rogers of Topeka is a defendant therein.

(a)(3) Giving due consideration to the information supra, and since an unprejudiced, unbiased court is the first requirement of due process, Judge Rogers should have recused himself in order to eliminate any possibility that bias and prejudice might condition his mind, sway his judgment, render him unable to exercise his functions impartially, make him lean towards one side of the cause for some reason other than a conviction of its justice, cause him to vent his spleen, retaliate or seek revenge

for/against imagined antagonism or induce him to behave other than with complete impartiality towards someone/anyone with the effrontery/insolence to insist on recognition, acknowledgement and exercise of constitutional rights, especially but not limited to due process and especially by the plaintiff in a case wherein he (Judge Rogers) is a defendant.

(a)(4) Considering all the circumstances/facts involved, particulary the numerous other petitions/ complaints submitted by petitioner/appellant/plaintiff during the past several years, including his most recent, i.e., case 79-3219, dated 20 November 1979 (copy attached/enclosed), and his action(s) already on appeal (Tenth C.C.A. 79-2056), and since Judge Rogers evidently considers petitioner's/appellant's use of the courts as a personal affront, he (petitioner/appellant) obviously hasn't ingratiated himself with the U.S.D.C. at Topeka. All supra conditions, occurrences combined plus the fact that the aforementioned behavior could happen and the ample reason(s) and inescapable conclusion that, in this instance, it did happen, is sufficient corroboration to confirm that Judge Rogers' failure to recuse himself was undoubtedly a failure to observe due process.

3.(b)(1) From the Court's Memorandum and Order, dated/FILED 17 December 1979, third paragraph, page 1, quote: *"Petitioner contends that he was illegally sentenced. The foundation of his claim is the assertion that one count should have been charged in the indictment rather than two."*

(b)(2) FACT: Petitioner has previously reiterated case law, e.g., *U.S. vs CALHOUN* and others (see paragraph 5 of this docketing statement), showing that in *all* instances, excepting only his case, that multiple counts of one transaction, i.e., only one (1) occurrence of simultaneous acts, constitutes only one (1) offense, and

that multiple sentences for different counts of only one (1) offense must recognize this maxim by running concurrent.

(b)(3) All of movant's innumerable habeas petitions have asked that the illegal doubling i.e., consecutive feature of his sentencing be vacated, but regardless of how many times he has previously sought such relief, the important consideration is the reason(s) he now gives to warrant it. As long as he has a valid reason, *not* previously presented, he is in compliance with 28-2244, i.e., he presents new grounds Not previously considered. It is *Not* necessary that he have a new issue, only new, different grounds not previously presented/considered for the same issue. Though all appurtenant case law, herein and previously presented/considered for the same herein and previously cited, is in full accord with statutory law, i.e., with 18-3568, petitioner's/appellant's habeas submittal 79-3236 relies solely on Title 18, Sec. 3568 because it qualifies as *new grounds not previously considered.*

3.(c)(1) From the court's Memorandum and Order (page 2) wherein it attacks petitioner's claim under 183568, quote: *"The Bureau of Prisons must compute his (defendant's/petitioner's/appellant's) sentence in accordance with the Judgement and Commitment Order which presumably reflects that he was sentenced to two consecutive terms."*

(c)(2) *FACT:* Petitioner/appellant *did not* and *does not* claim that the Bureau of Prisons is at fault in this instance. It was the trial/sentencing court, *NOT* the Attorney General that illegally assessed consecutive sentences. Petitioner/appellant seeks relief in the court of incarceration, i.e., the U.S.D.C. at Topeka, because he has shown that a 2255 Motion to the sentencing court is inadequate and ineffective to provide the relief sought.

See attached/enclosed denial by a Judge Andrew Hauk, FILED 30 April 1979, and numbered, upper right corner, as document 58).

(c)(3) Petitioner asked that the consecutive feature of his sentencing be vacated. The law (18-3568) mandates such action, yet the Memorandum and Order (page 2) says that such requested action is frivilous and is denied on its merits. Further, petitoner/appellant submits proof (see attached/enclosed documents dated 30 April 1979 and designated upper right corner as number 56) that the Section 2255 gimmickry is an illegal instrument, means, ploy, an EX POST FACTO concoction to deprive petitioners/appellants of their guaranteed constitutional rights; that it is completely and totally unconstitutional, a nullity from inception, void ab inito, because it does exactly what it was designed to do, i.e., permits suspension of the privilege of habeas corpus in violation of ARTICLE 1, Section 9, paragraph 2 of the U.S. Constitution.

(c)(4) A convict has the right to test the legality of his conviction/sentence by the use of habeas corpus, i.e., he has the right to file a petition seeking his release via writ of habeas corpus ad subjiciendum. ARTICLE 1, Section 9, paragraph 2 of the U.S. Constitution guarantees such right, but substituting in lieu thereof the mandatory section 2255 proceedings not only permits unwarranted delay in even the preliminary steps leading to application for the habeas writ, it can *also be and is* used for the express purpose of effectively barring *ANY* resort to the habeas corpus (28-2241/53) statutes whatsoever. Thus, denial of supra right to so proceed without the time consuming handicap of prior 2255 involvement causes unnecessary and unwarranted delay, i.e., causes incarceration/punishment in excess of what can be technically justified. *A statute which may have the effect of depriving a convicted person of supra right to*

challenge his conviction/confinement via habeas corpus (28-2241/53) is EX POST FACTO, and therefore unconstitutional. See ARTICLE 1, Section 9, paragraphs 3 of the U.S. Constitution.

(c)(5) EX POST FACTO LAW: *"Every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage." State v Rowe,* 116 N.J.L. 48, 181 A 706.

(c)(6) EX POST FACTO LAW: *"An increase in possible penalty is* ex post facto *regardless of length of sentence actually imposed." EX PARTE FLORA,* Ohio App., 31 N.E. 2nd 482, 485.

(c)(7) EX POST FACTO LAW: *"Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." State v Pleason,* 56 N.D. 499, 218 N.W. 154, 155.

(c)(8) Concerning (c)(5), (c)(6) and (c)(7) supra, there is no denying that the contrived delay made possible by the 2255 requirement does, for one illegally confined, alter the situation by increasing punishment, i.e., causing more exensive/greater punishment.

(c)(9) Section 2255 proceedings are included with and numbered as part of the habeas corpus statutes. See Chapter 153, Title 28, Sections 2241 thru 2255 of Federal Rules. Despite this, the U.S. Supreme Court has carefully skirted the issue of its constitutionality and refused to recognize and identify it as habeas corpus proceeding. In lieu thereof, the Court opined that 'a 2255 Motion is a broad as habeas corpus'. From such statement and from the *omission of any forthwith requirement, which is the essence of habeas corpus,* we must conclude that 2255 is *NOT* habeas corpus. See *U.S. v Hayman,* No. 12297

Ninth C.C.A., 27 Oct. 1950, 187 F. 2d 456, 71 S. Ct. 803. Also, as previously noted, see attached/enclosed documents dated 30 April 1979 and designated upper right corner as number 56).

4. The questions presented are:

(a) Wasn't petitioner/appellant denied due process as charged in paragraph 3-(a)(1), (a)(2), (a)(3) and (a)(4)?

(b) Doesn't the presentation of new, different grounds *NOT* previously considered, constitute compliance with the law, i.e., with 28-2244, even though it concerns the same issue?

(c) Doesn't 18-3568 nullify *consecutive* sentences for different counts of only one (1) offense?

(d) how does one violate a penalty (sentencing) statute, e.g., 18-924(a)?

(e) Does the presentation of proof showing illegal imprisonment constitute frivolity?

(f) Can different circuits legally and indefinately maintain diverse rulings regarding interpretation of the same law(s)?

(g) Shouldn't such appellate court divarication be terminated forwith?

(h) Isn't its continued existance a denial of the equal protection afforded by due process?

(i) Doesn't the required use of a Section 2255 Motion permit/cause suspension of the privilege of habeas corpus?

(j) Isn't that what it was designed to do?

(k) Isn't 28-2255 EX POST FACTO and therefore unconstitutional?

5. Cases supporting petitioner's/appellant's contentions, in addition to those noted in paragraphs 3-(c)(5), (c)(6), and (c)(7) supra, are listed on *back of pages 3 and 4* of his 2255 submittal to the sentencing court, Phoenix, Arizona, dated 24 March 1979, and designated, upper right corner as document number 55). See copy attached/enclosed.

6. Appellant shall be available for oral arguments subsequent to 30 June 1980.

7. All the herein referenced documents, attachment/enclosures are to be considered/recognized as a permanent part of this DOCKETING STATEMENT, their presence/duplication elsewhere in these appeal proceedings notwithstanding.

8. Appellant certifies that the original and nine copies of this docketing statement were mailed to the Clerk, Tenth C.C.A., U.S. Courthouse, Denver, Colorado, 80294, and on the same date, i.e., 31 - January 1980, one copy was mailed to the U.S. Attorney, 444 Quincy, Topeka, Kansas, 66683.

DATED 17 January 1980.

Respectfully submitted,
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Russell Floyd Long (03892-156)
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